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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROGER WarBURTON et al.,

Plaintiffs and Appellants,

v.

KARL ZINNER et al.,

Defendants and Respondents.

D054470

(Super. Ct. No. GIN057373)

APPEAL from an order of the Superior Court of San Diego County, Michael B. Orfield, Judge. Reversed.

I

INTRODUCTION

The trial court awarded attorney fees to parties who successfully petitioned to compel arbitration of a dispute. We reverse the trial court's order, concluding the award is premature because the agreement does not provide for an interim attorney fee award

and "the party prevailing on the contract" under Civil Code¹ section 1717 cannot yet be determined.

II

FACTUAL AND PROCEDURAL BACKGROUND

Roger and Karen Warburton purchased a home in Pauma Valley from Karl and Barbara Zinner. The Warburtons later sued the Zinners for fraudulent nondisclosure, among other claims. Six months after the litigation commenced, the Zinners petitioned to compel arbitration. The Warburtons opposed the motion, arguing the Zinners had waived their right to compel arbitration by participating in the litigation. The trial court granted the motion to compel after finding the arbitrator must decide the waiver issue. The Warburtons petitioned for a writ of mandate. We granted the petition and directed the trial court to decide the waiver issue. In addition, we awarded costs to the Warburtons as the prevailing party on the petition. (*Warburton v. Superior Court* (Apr. 16, 2008, D051619) [nonpub. opn.].)

The trial court subsequently determined the Zinners had not waived their right to arbitration by participation in the litigation and the trial court once again granted their petition to compel arbitration. The trial court stayed the case pending completion of the arbitration.

The Zinners then moved for an interim award of attorney fees and costs for their successful petition to compel. They claimed entitlement to a fee award under the

¹ Further statutory references are to the Civil Code.

attorney fees clause of the parties' agreement. The trial court granted the Zinnners' motion and awarded them the full amount they requested, which included the attorney fees they incurred in unsuccessfully opposing the Warburtons' petition for writ of mandate.

The Warburtons appeal, contending the trial court erred in awarding interim fees and costs to the Zinnners because the attorney fees clause contained in the parties' agreement only authorizes an award of attorney fees and costs to the overall prevailing party and there is no overall prevailing party yet. The Warburtons further contend the trial court erred in awarding the Zinnners attorney fees for their unsuccessful opposition to the petition for writ of mandate. We agree with the former contention and reverse the order. In view of our conclusion, we do not address the Warburtons' latter contention.

III

DISCUSSION

Whether a party is entitled to recover contractual attorney fees is a legal question we review de novo. (*Van Slyke v. Gibson* (2007) 146 Cal.App.4th 1296, 1299.) The Zinnners claim entitlement to an attorney fee award based on paragraph 22 of the parties' agreement, which provides for an award of reasonable attorney fees to the prevailing party "[i]n any action, proceeding, or arbitration . . . arising from this Agreement."

"[S]ection 1717 governs awards of attorney fees based upon a contract and authorizes an award of attorney fees to a prevailing party '[i]n any action on a contract' 'to enforce that contract' if the contract provides for an award of attorney fees. [Citation.] '[T]he party prevailing on the contract shall be the party who recovered a greater relief in

the action on the contract' and shall be determined by the court." (*Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 806 (*Otay River*).)

Determining "the party prevailing on the contract," requires the court to compare "the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' " (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 876; accord, *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1097; *Poseiden Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1120; *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 928.)

In this case, there has been no final resolution of the parties' contract claims. The parties are arbitrating the claims and the trial court stayed further court proceedings pending the outcome of the arbitration. Therefore, "the party prevailing on the contract" cannot yet be determined and the trial court erred in awarding the Zinnners attorney fees and costs for prevailing on their petition to compel arbitration. (*Lachkar v. Lachkar* (1986) 182 Cal.App.3d 641, 648-649 (*Lachkar*).)

Contrary to the Zinnners' assertions, *Lachkar* was not affected by subsequent revisions to the definition of "prevailing party" under section 1717. At the time the appellate court decided *Lachkar*, the definition of prevailing party was " 'the party who is entitled to recover costs of suit.' " (*Lachkar, supra*, 182 Cal.App.3d at p. 648.) This

definition required " 'some reckoning of the net success of the respective parties,' " which " 'cannot be ascertained until the final termination of the suit.' " (*Id.* at p. 649.) The current definition of prevailing party, "the party who recovered a greater relief in the action on the contract" (§ 1717, subd. (b)(1)), also requires an assessment of the net success of the respective parties and cannot be determined until the parties' contract claims are finally resolved. (*Hsu v. Abbbara, supra*, 9 Cal.4th at p. 876; accord, *Zagami, Inc. v. James A. Crone, Inc., supra*, 160 Cal.App.4th at p. 1097; *Poseiden Development, Inc. v. Woodland Lane Estates, LLC, supra*, 152 Cal.App.4th at p. 1120; *Butler-Rupp v. Lourdeaux, supra*, 154 Cal.App.4th at p. 928.) Accordingly, *Lachkar's* holding regarding the unavailability of attorney fees following a successful petition to compel arbitration remains apropos to analogous cases such as this one.

Furthermore, the Zinners' reliance on this court's decision in *Otay River* is misplaced. In *Otay River*, the plaintiff entered into three agreements with the defendant. Two of the agreements contained a binding arbitration clause. One did not. (*Otay River, supra*, 158 Cal.App.4th at p. 800.) The plaintiff initiated two arbitration proceedings against the defendant, claiming the disputes arose under one of the agreements containing a binding arbitration clause. The defendant denied the plaintiff's claim and the plaintiff petitioned to compel arbitration. (*Ibid.*) The superior court denied the petition, finding the plaintiff's disputes arose under the agreement that did not contain a binding arbitration clause. The plaintiff did not appeal the trial court's ruling. The defendant subsequently moved for attorney fees and costs, claiming it was the prevailing party on the contract

because it obtained a final order denying the petition to compel. The trial court denied the motion because the parties contemplated additional litigation. (*Id.* at p. 801.)

On appeal, we concluded the trial court erred in denying the defendant an attorney fees award. (*Otay River, supra*, 158 Cal.App.4th at p. 808.) Instead, we concluded the defendant was entitled to an attorney fees award because it prevailed on the petition to compel, the petition to compel was an "action on the contract" for purposes of section 1717, and the trial court's order denying the petition to compel was the final resolution of a discrete legal proceeding. (*Id.* at p. 807.) In reaching our conclusion, we specifically distinguished *Lachkar* because the order compelling arbitration at issue in *Lachkar* was not "a final determination of the rights of the parties entitling petitioners to attorney fees." (*Id.* at p. 807.) Likewise, the order compelling arbitration at issue in this case is not a final determination of the parties' rights. Consequently, *Otay River* is not applicable and does not support the Zinners' claim for attorney fees.

Acosta v. Kerrigan (2007) 150 Cal.App.4th 1124 (*Acosta*), another case upon which the Zinners rely, is also distinguishable. In *Acosta*, the defendant successfully petitioned to compel arbitration under an agreement containing a binding arbitration clause. The defendant then moved for an interim attorney fees award. (*Id.* at p. 1126.) The agreement contained two attorney fees clauses. One clause provided for an attorney fees award to the prevailing party in an arbitration arising under the agreement. (*Id.* at p. 1126, fn. 2.) The other clause provided that, if one party initiated an action or proceeding other than an arbitration, then the responding party was entitled to recover attorney fees from the initiating party. (*Id.* at p. 1126.) The appellate court concluded the defendant

was entitled to an interim attorney fees award because the second attorney fees clause was an independent provision permitting a party who is forced to petition to compel arbitration to recover the attorney fees incurred in making the successful petition even if the party ends up losing on the merits in the arbitration. (*Id.* at p. 1132.)

Unlike the agreement in *Acosta*, the agreement in this case does not contain an independent attorney fees clause authorizing an interim award of attorney fees to a party who successfully petitions to compel arbitration. Accordingly, *Acosta* does not support the Zinners' position.

Turner v. Schultz (2009) 175 Cal.App.4th 974 (*Turner*) is similarly inapposite. In *Turner*, the plaintiff sued the defendants alleging an agreement between them was procured by fraud. (*Id.* at p. 977.) The plaintiff then filed a separate action in a separate county seeking declaratory and injunctive relief precluding arbitration of the parties' dispute. (*Id.* at p. 978.) The trial court in the second action denied the requested relief and subsequently awarded the defendants contractual attorney fees. (*Id.* at pp. 978-979, 985.)

On appeal, the appellate court noted that, like the agreement at issue in *Acosta*, the agreement at issue in *Turner* contained two attorney fees clauses. One clause entitled the prevailing party in an arbitration to an award of attorney fees. The other clause entitled the prevailing party in an action to enforce the agreement to an award of attorney fees. (*Turner, supra*, 175 Cal.App.4th at pp. 979, 981-982.) In addition, the appellate court noted that, like the *Otay River* case, the *Turner* case involved a discrete legal proceeding that had been finally resolved. (*Turner, supra*, 175 Cal.App.4th at p. 983.) Analogizing

to *Acosta* and *Otay River*, the appellate court in *Turner* concluded the trial court properly awarded attorney fees to defendants because they were independently entitled to them under the second attorney fees clause regardless of the outcome of the arbitration and no further proceedings in the same litigation were contemplated. (*Turner, supra*, 175 Cal.App.4th at pp. 983-984.)

As we previously explained, the agreement at issue in this case does not contain an attorney fees clause that independently entitles a party to an award of attorney fees for successfully petitioning to compel arbitration. In addition, the order compelling arbitration did not conclude the trial court proceedings between the parties. Rather, the trial court proceedings have been stayed pending the outcome of the arbitration. Therefore, *Turner* does not support an interim attorney fees award to the Zinners.

IV

DISPOSITION

The order is reversed. Appellants are awarded costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.